January 13, 2016

SENATE BILL No. 23

DIGEST OF SB 23 (Updated January 12, 2016 11:39 am - DI 73)

Citations Affected: IC 5-30; IC 5-32; IC 6-3; IC 6-3.1; IC 6-8.

Synopsis: Technical corrections. Repeals conflicting provisions contained in HEA 1019-2015 (Common construction wage and public works) concerning applicability of the requirements in HEA 1019-2015. The provisions that would be repealed were added by HEA 1019-2015 and repealed by SEA 441-2015 during the 2015 legislative session. Clarifies that the principal amount of money contributed by an employer to a medical care savings account (MSA) for which no state or federal tax exemption for the employee applies may be withdrawn from the MSA account for any purpose without the employee incurring taxable income based on the principal contribution. Makes technical corrections and conforming changes to SEA 441-2015. (The introduced version of this bill was prepared by the code revision commission.)

Effective: Upon passage; July 1, 2015 (retroactive); January 1, 2016 (retroactive).

Hershman, Holdman

January 5, 2016, read first time and referred to Committee on Tax & Fiscal Policy.
January 12, 2016, reported favorably — Do Pass.

January 13, 2016

Second Regular Session 119th General Assembly (2016)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2015 Regular Session of the General Assembly.

SENATE BILL No. 23

A BILL FOR AN ACT to amend the Indiana Code concerning taxation.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 5-30-8-7 IS REPEALED [EFFECTIVE JULY 1, 2015 (RETROACTIVE)]. ~~Sec. 7. IC 5-16-13 and IC 5-16-14 apply to a contract awarded under this article.~~

SECTION 2. IC 5-32-1-4 IS REPEALED [EFFECTIVE JULY 1, 2015 (RETROACTIVE)]. ~~Sec. 4. IC 5-16-13 and IC 5-16-14 apply to a contract awarded under this article, regardless of which applicable public works statute applies to the contract.~~

SECTION 3. IC 6-3-2-2, AS AMENDED BY P.L.250-2015, SECTION 14, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. (a) With regard to corporations and nonresident persons, "adjusted gross income derived from sources within Indiana", for the purposes of this article, shall mean and include:

(1) income from real or tangible personal property located in this state;

(2) income from doing business in this state;

(3) income from a trade or profession conducted in this state;

(4) compensation for labor or services rendered within this state;

and

(5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property to the extent that the income is apportioned to Indiana under this section or if the income is allocated to Indiana or considered to be derived from sources within Indiana under this section.

Income from a pass through entity shall be characterized in a manner consistent with the income's characterization for federal income tax purposes and shall be considered Indiana source income as if the person, corporation, or pass through entity that received the income had directly engaged in the income producing activity. Income that is derived from one (1) pass through entity and is considered to pass through to another pass through entity does not change these characteristics or attribution provisions. In the case of nonbusiness income described in subsection (g), only so much of such income as is allocated to this state under the provisions of subsections (h) through (k) shall be deemed to be derived from sources within Indiana. In the case of business income, only so much of such income as is apportioned to this state under the provision of subsection (b) shall be deemed to be derived from sources within the state of Indiana. In the case of compensation of a team member (as defined in section 2.7 of this chapter), only the portion of income determined to be Indiana income under section 2.7 of this chapter is considered derived from sources within Indiana. In the case of a corporation that is a life insurance company (as defined in Section 816(a) of the Internal Revenue Code) or an insurance company that is subject to tax under Section 831 of the Internal Revenue Code, only so much of the income as is apportioned to Indiana under subsection (r) is considered derived from sources within Indiana.

(b) Except as provided in subsection (l), if business income of a corporation or a nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by the following:

(1) For all taxable years that begin after December 31, 2006, and before January 1, 2008, a fraction. The:

(A) numerator of the fraction is the sum of the property factor plus the payroll factor plus the product of the sales factor multiplied by three (3); and

(B) denominator of the fraction is five (5).

(2) For all taxable years that begin after December 31, 2007, and before January 1, 2009, a fraction. The:

(A) numerator of the fraction is the property factor plus the payroll factor plus the product of the sales factor multiplied by four and sixty-seven hundredths (4.67); and

(B) denominator of the fraction is six and sixty-seven hundredths (6.67).

(3) For all taxable years beginning after December 31, 2008, and before January 1, 2010, a fraction. The:

(A) numerator of the fraction is the property factor plus the payroll factor plus the product of the sales factor multiplied by eight (8); and

(B) denominator of the fraction is ten (10).

(4) For all taxable years beginning after December 31, 2009, and before January 1, 2011, a fraction. The:

(A) numerator of the fraction is the property factor plus the payroll factor plus the product of the sales factor multiplied by eighteen (18); and

(B) denominator of the fraction is twenty (20).

(5) For all taxable years beginning after December 31, 2010, the sales factor.

(c) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the taxable year and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the taxable year. However, with respect to a foreign corporation, the denominator does not include the average value of real or tangible personal property owned or rented and used in a place that is outside the United States. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight (8) times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals. The average of property shall be determined by averaging the values at the beginning and ending of the taxable year, but the department may require the averaging of monthly values during the taxable year if reasonably required to reflect properly the average value of the taxpayer's property.

(d) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year. However, with

respect to a foreign corporation, the denominator does not include compensation paid in a place that is outside the United States. Compensation is paid in this state if:

(1) the individual's service is performed entirely within the state;

(2) the individual's service is performed both within and without this state, but the service performed without this state is incidental to the individual's service within this state; or

(3) some of the service is performed in this state and:

(A) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state; or

(B) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual is a resident of this state.

(e) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year. Sales include receipts from intangible property and receipts from the sale or exchange of intangible property. However, with respect to a foreign corporation, the denominator does not include sales made in a place that is outside the United States. Receipts from intangible personal property are derived from sources within Indiana if the receipts from the intangible personal property are attributable to Indiana under section 2.2 of this chapter. Regardless of the f.o.b. point or other conditions of the sale, sales of tangible personal property are in this state if:

(1) the property is delivered or shipped to a purchaser that is within Indiana, other than the United States government; or

(2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and the purchaser is the United States government.

Gross receipts derived from commercial printing as described in IC 6-2.5-1-10 and from the sale of computer software shall be treated as sales of tangible personal property for purposes of this chapter.

(f) Sales, other than receipts from intangible property covered by subsection (e) and sales of tangible personal property, are in this state if:

(1) the income-producing activity is performed in this state; or

(2) the income-producing activity is performed both within and without this state and a greater proportion of the income-producing activity is performed in this state than in any

other state, based on costs of performance.

(g) Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in subsections (h) through (k).

(h)(1) Net rents and royalties from real property located in this state are allocable to this state.

(2) Net rents and royalties from tangible personal property are allocated to this state:

(i) if and to the extent that the property is utilized in this state; or

(ii) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year, and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(i)(1) Capital gains and losses from sales of real property located in this state are allocable to this state.

(2) Capital gains and losses from sales of tangible personal property are allocable to this state if:

(i) the property had a situs in this state at the time of the sale; or

(ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(3) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(j) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

(k)(1) Patent and copyright royalties are allocable to this state:

(i) if and to the extent that the patent or copyright is utilized by the taxpayer in this state; or

(ii) if and to the extent that the patent or copyright is utilized by the taxpayer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(2) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(l) If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting;

(2) for a taxable year beginning before January 1, 2011, the exclusion of any one (1) or more of the factors, except the sales factor;

(3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(m) In the case of two (2) or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests, the department shall distribute, apportion, or allocate the income derived from sources within the state of Indiana between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from sources within the state of Indiana by various taxpayers.

(n) For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if:

(1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or

(2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(o) Notwithstanding subsections (l) and (m), the department may not, under any circumstances, require that income, deductions, and credits attributable to a taxpayer and another entity be reported in a combined income tax return for any taxable year, if the other entity is:

(1) a foreign corporation; or

(2) a corporation that is classified as a foreign operating corporation for the taxable year by section 2.4 of this chapter.

(p) Notwithstanding subsections (l) and (m), the department may not require that income, deductions, and credits attributable to a taxpayer and another entity not described in subsection (o)(1) or (o)(2) be reported in a combined income tax return for any taxable year, unless the department is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to the department by subsections (l) and (m).

(q) Notwithstanding subsections (o) and (p), one (1) or more taxpayers may petition the department under subsection (l) for permission to file a combined income tax return for a taxable year. The petition to file a combined income tax return must be completed and filed with the department not more than thirty (30) days after the end of the taxpayer's taxable year. A taxpayer filing a combined income tax return must petition the department within thirty (30) days after the end of the taxpayer's taxable year to discontinue filing a combined income tax return.

(r) This subsection applies to a corporation that is a life insurance company (as defined in Section 816(a) of the Internal Revenue Code) or an insurance company that is subject to tax under Section 831 of the Internal Revenue Code. The corporation's adjusted gross income that is derived from sources within Indiana is determined by multiplying the corporation's adjusted gross income by a fraction:

(1) the numerator of which is the direct premiums and annuity considerations received during the taxable year for insurance upon property or risks in the state; and

(2) the denominator of which is the direct premiums and annuity considerations received during the taxable year for insurance upon property or risks everywhere.

The term "direct premiums and annuity considerations" means the gross premiums received from direct business as reported in the corporation's annual statement filed with the department of insurance.

(s) This subsection applies to receipts derived from motorsports racing.

(1) Any purse, prize money, or other amounts earned for placement or participation in a race or portion thereof, including

qualification, shall be attributed to Indiana if the race is conducted in Indiana.

(2) Any amounts received from an individual or entity as a result of sponsorship or similar promotional consideration for one (1) or more races shall be in this state in the amount received, multiplied by the following fraction:

(A) The numerator of the fraction is the number of racing events for which sponsorship or similar promotional consideration has been paid in a taxable year and that occur in Indiana.

(B) The denominator of the fraction is the total number of racing events for which sponsorship or similar promotional consideration has been paid in a taxable year.

(3) Any amounts earned as an incentive for placement or participation in one (1) or more races and that are not covered under ~~subdivisions~~ **subdivision** (1) or (2) or under IC 6-3-2-3.2 shall be attributed to Indiana in the proportion of the races that occurred in Indiana.

This subsection, as enacted in 2013, is intended to be a clarification of the law and not a substantive change in the law

SECTION 4. IC 6-3.1-26-15, AS AMENDED BY P.L.250-2015, SECTION 32, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 15. (a) Subject to subsection (d), a taxpayer may carry forward an unused credit for the number of years determined by the corporation, not to exceed nine (9) consecutive taxable years, beginning with the taxable year after the taxable year in which the taxpayer makes the qualified investment.

(b) The amount that a taxpayer may carry forward to a particular taxable year under this section equals the unused part of a tax credit allowed under this chapter.

(c) A taxpayer may:

(1) claim a tax credit under this chapter for a qualified investment; and

(2) carry forward a remainder for one (1) or more different qualified investments;

in the same taxable year.

(d) This subsection applies only to a taxpayer that:

(1) is not a pass through entity;

(2) proposes at least five hundred million dollars ($500,000,000) in total investment over a five (5) year period; and

(3) enters into **a** written agreement with the corporation under this subsection before January 1, 2017, and agrees to claim tax credits

under this chapter for not more than one hundred seventy million dollars ($170,000,000) of qualified investment that is made as part of the investment proposed as described in subdivision (2).

If a tax credit awarded under this chapter exceeds a taxpayer's state income tax liability for the taxable year, notwithstanding subsection (a), the corporation may accelerate to that taxable year the excess amount of the tax credit that could otherwise be carried forward under subsection (a). The excess amount of the tax credit accelerated under this subsection shall be discounted as determined under a written agreement entered into by the taxpayer and the corporation. The discounted amount of the excess tax credit accelerated under this subsection as determined by the corporation may be remitted to the taxpayer as provided in the written agreement between the corporation and the taxpayer. Subject to subsection (f), the total amount of qualified investments for which tax credits may be accelerated under this subsection may not exceed one hundred seventy million dollars ($170,000,000). The ~~requirements~~ **requirement** for an agreement under section 21(11) of this chapter ~~do~~ **does** not apply to this subsection. This subsection expires December 31, 2025.

(e) A written agreement under subsection (d) may contain a provision for payment of liquidated damages:

(1) to the corporation for failure to comply with the conditions set forth in this chapter and the agreement entered into by the corporation and taxpayer under this chapter; and

(2) that are in addition to an assessment made by the department for noncompliance under section 23 of this chapter.

This subsection expires December 31, 2025.

(f) The total aggregated amount of tax credits that the corporation may discount under subsection (d) and section 16(d) of this chapter in a state fiscal year may not exceed seventeen million dollars ($17,000,000), as determined before the discount is applied. This subsection expires December 31, 2025.

SECTION 5. IC 6-3.1-26-16, AS AMENDED BY P.L.250-2015, SECTION 33, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 16. (a) If a pass through entity does not have state tax liability against which the tax credit may be applied, a shareholder, member, or partner of the pass through entity is entitled to a tax credit equal to:

(1) the tax credit determined for the pass through entity for the taxable year; multiplied by

(2) the percentage of the pass through entity's distributive income to which the shareholder, member, or partner is entitled.

(b) Subject to subsection (d), a shareholder, member, or partner of a pass through entity that is entitled to a tax credit under this section may carry forward an unused credit for the number of years determined by the corporation, not to exceed nine (9) consecutive taxable years, beginning with the taxable year after the taxable year in which the pass through entity makes the qualified investment.

(c) The amount that a shareholder, member, or partner may carry forward to a particular taxable year under this section equals the unused part of a tax credit allowed under this chapter to which the shareholder, member, or partner is entitled.

(d) This subsection applies only to a pass through entity that:

(1) proposes at least five hundred million dollars ($500,000,000) in total investment over a five (5) year period; and

(2) enters into a written agreement with the corporation under this subsection before January 1, 2017, and the shareholders, members, or partners of the pass through entity agree to claim tax credits under this chapter for not more than one hundred seventy million dollars ($170,000,000) of qualified investment that is made as part of the investment proposed as described in subdivision (1).

Notwithstanding subsection (b), the corporation may accelerate to the current taxable year the excess tax credit amount that could otherwise be carried forward by all shareholders, members, or partners of a pass through entity under subsection (b). The excess amount of the tax credit accelerated under this subsection shall be discounted as determined under a written agreement entered into by the pass through entity and the corporation. Subject to subsection (f), the total amount of qualified investments for which tax credits may be accelerated under this subsection may not exceed one hundred seventy million dollars ($170,000,000). The discounted amount of the excess tax credit accelerated under this subsection as determined by the corporation may be remitted to the shareholders, members, or partners of the pass through entity as provided in the written agreement between the corporation and the pass through entity. The ~~requirements~~ **requirement** for an agreement under section 21(11) of this chapter ~~do~~ **does** not apply to this subsection. This subsection expires December 31, 2025.

(e) A written agreement under subsection (d) may contain a provision for payment of liquidated damages:

(1) to the corporation for failure to comply with the conditions set forth in this chapter and the agreement entered into by the corporation and pass through entity under this chapter;

(2) that are personally guaranteed by the shareholders, members, or partners of the pass through entity; and

(3) that are in addition to an assessment made by the department for noncompliance under section 23 of this chapter.

This subsection expires December 31, 2025.

(f) The total aggregated amount of tax credits that the corporation may discount under subsection (d) and section 15(d) of this chapter in a state fiscal year may not exceed seventeen million dollars ($17,000,000), as determined before the discount is applied. This subsection expires December 31, 2025.

SECTION 6. IC 6-8-11-11.5, AS ADDED BY P.L.250-2015, SECTION 46, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2016 (RETROACTIVE)]: Sec. 11.5. If an employer contributes money to an account under this chapter after December 31, 2015, for which no exemption applies under IC 6-3-2-18(c) **and for which no exemption or exclusion applies under the Internal Revenue Code at the time of contribution:**

(1) the money may be withdrawn from the account by the employee at any time and for any purpose without a penalty; **and**

(2) the withdrawal of the principal amount contributed by the employer is not income to the employee that is subject to taxation under IC 6-3-1 through IC 6-3-7.

SECTION 7. IC 6-8-11-17 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2016 (RETROACTIVE)]: Sec. 17. (a) An employee may, under this section, withdraw money from the employee's medical care savings account for a purpose other than the purposes set forth in section 13 of this chapter.

(b) Except as provided in ~~section~~ **sections** 11(b) **and 11.5** of this chapter, if an employee withdraws money from the employee's medical care savings account on the last business day of the account administrator's business year for a purpose not set forth in section 13 of this chapter:

(1) the money withdrawn is income to the individual that is subject to taxation under IC 6-3-2-18(e); but

(2) the withdrawal does not:

(A) subject the employee to a penalty; or

(B) make the interest earned on the account during the tax year taxable as income of the employee.

(c) Except as provided in ~~section~~ **sections** 11(b) **and 11.5** of this chapter, if an employee withdraws money for a purpose not set forth in section 13 of this chapter at any time other than the last business day of the account administrator's business year, all of the following apply:

(1) The amount of the withdrawal is income to the individual that is subject to taxation under IC 6-3-2-18(e).

(2) The administrator shall withhold and, on behalf of the employee, pay a penalty to the department of state revenue equal to ten percent (10%) of the amount of the withdrawal.

(3) All interest earned on the balance in the account during the tax year in which a withdrawal under this subsection is made is income to the individual that is subject to taxation under IC 6-3-2-18(f).

(d) Money paid to the department of state revenue as a penalty under this section shall be deposited in the local health maintenance fund established by IC 16-46-10-1.

SECTION 8. IC 6-8-11-23 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2016 (RETROACTIVE)]: Sec. 23. (a) This section applies when the employment of an individual by an employer that participates in a medical care savings account program is terminated.

(b) If the former employer is not informed, within ninety (90) days after the former employee's final day of employment, of the name and address of an account administrator to which the former employer is transferring the former employee's medical care savings account under section 21 of this chapter, the former employer shall pay the money in the former employee's medical care savings account to the former employee under subsection (d).

(c) If:

(1) the former employee, under section 22(2) of this chapter, requests in writing that the former employer's account administrator remain the administrator of the individual's medical care savings account; and

(2) the account administrator does not agree to retain the account;

the former employer shall, within ninety (90) days after the former employee's final day of employment, pay the money in the former employee's medical care savings account to the former employee under subsection (d).

(d) An employer that is required under this section to pay the money in a former employee's medical care savings account to the former employee shall mail to the former employee, at the former employee's last known address, a check for the balance in the account on the ninety-first day after the employee's final day of employment.

(e) Except as provided in ~~section~~ **sections** 11(b) **and 11.5** of this chapter, money that is paid to a former employee under subsection (d):

(1) is subject to taxation under IC 6-3-1 through IC 6-3-7 as

income of the individual; but

(2) is not subject to the penalty referred to in section 17(c)(2) of this chapter.

SECTION 9. **An emergency is declared for this act.**

COMMITTEE REPORT

Madam President: The Senate Committee on Tax & Fiscal Policy, to which was referred Senate Bill No. 23, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is to SB 23 as introduced.)

HERSHMAN, Chairperson

Committee Vote: Yeas 10, Nays 0